United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 21, 2006

TO : Dorothy L. Moore-Duncan, Regional Director

Region 4

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Stepan Co.

Case 4-CA-34417 524-5056-1600 524-5056-2200

530-6067-6033-8800 530-6067-6067-7000

This Section 8(a)(3) case was submitted for advice as to whether the Employer's lockout of its employees was unlawful either because (1) prior to the lockout, the Employer had refused to provide the Union with relevant information needed to intelligently consider the Employer's best and final offer; and/or (2) the Employer had failed to clearly and fully inform the Union what it needed to do to end the lockout. We conclude that the lockout was unlawful because it was in furtherance of an unlawful bargaining position created by the Employer's failure to provide the requested information. We also conclude that the Employer adequately informed the Union of what was necessary to end the lockout.

FACTS

Stepan Company (Employer) is a multi-national corporation headquartered in Northfield, Illinois. It produces chemicals for soap and cosmetic applications, and has about 15 facilities located globally, including one in Fieldsboro, NJ. The Fieldsboro plant was organized by Electrical Workers UE Local 155 (Union) and two bargaining units were certified in January 2005, a five person laboratory/technician unit and a then-36 person production and maintenance unit. The parties have tentatively agreed at the table to merge these into a single unit, and there are currently 38 people in the combined unit.

The parties began bargaining for a first contract in April 2005, and met approximately every three weeks through December 2005. Between April and November, the parties discussed principally non-economic issues, and reached tentative agreements in many areas, including union

security and dues checkoff, grievance procedure, and overtime and Sunday premium pay.

On November 14, 2005, the parties began bargaining over economic issues. 1 On November 30, 2005, the Employer made its initial proposal on wages. The proposal included across the board wage cuts. The Employer conceded that the proposal was made in order to move the Union off its initial position stated in April. Wages were discussed during the session and also during the parties' December 1, 2005 session. The Employer revised its proposal two or three times during each session, and the Union presented a counter proposal each time. On December 7, 2005, the Employer presented its final offer, which essentially called for a wage freeze in the first year followed by three percent raises in years two and three. The Union offered to accept the Employer's wage proposal in exchange for the Employer's acceptance of the Union's benefits proposal, but to no avail.

The parties met again on January 10, 2006² and discussed a first-year wage increase, short-term disability coverage, and payment for lost time for the Union's bargaining committee. The Employer insisted on its December 7 wage offer, explaining that it routinely compared its wage rates to those of other local companies using wage surveys, and stated that it thought its offer was fair. There was no further movement on the part of either party. The Employer suggested that the parties were at impasse and threatened to implement parts of its final offer. The session ended with the Employer agreeing to provide the Union with time to get back with the Employer.

By letter dated January 17, the Union requested information concerning the Employer's use of wage surveys, and information that would permit the comparison of that information with the actual wage increases provided in particular years in order to bargain intelligently concerning the Employer's wage proposal. The letter, in pertinent part, requested the following information:

In any year prior to 2004-5, did Stepan Chemicals utilize the Hourly Way Survey Data collected by the

¹ A 24-hour sickout was held between November 9 and 10, with 23 of 37 employees calling out during that time. Accordingly, matters were tense between the parties before the November 14 session started.

 $^{^2}$ All dates hereafter are in 2006 unless otherwise noted.

chemical company association, which you previously supplied to us, to determine the level of wage increases at Fieldsboro (decrease or freezes) which it provided to employees now represented by our union? If your answer is affirmative, please provide us with copies of all of those surveys for each year in which such survey impacted wage actions taken by the Company from 1994 through the present date;

Copies of any and all additional wage surveys used by Stepan Company in evaluating and adjusting the wage structure for Fieldsboro employees from 1994 to the present;

A listing of annual wage adjustments (increases, deceases, or freezes) provided to Fieldsboro employees from 1994 to the present, which includes the following information:

The amount of each such increase or decrease;

The effective date of each such increase or decrease;

The basis for calculating the amount of such increases or decreases;

The classifications which each increase, decrease or wage freeze affected;

Notation of years in which no increase was given, along with the reason no increase was given.

The Union indicated in its letter that the Employer's statements during the January 10 session about routinely using these surveys to set wages prompted the information request.

By letter dated January 20 the Employer stated that it refused to provide the information requested because it believed the Union was merely seeking discovery in its then-pending Section 8(a)(3) charge, filed January 10, in Case 4-CA-34385. That charge alleged that the Employer had retaliated and discriminated against Fieldsboro employees by failing to give a purportedly promised and budgeted wage increase in 2005, and that the Employer had decreased its wage proposal at the bargaining table in retaliation for

the Union having previously filed unfair labor practice charges against it. 3

The Region has found merit to the Union's allegation in the instant case that the Employer failed and refused to timely provide the information requested on January 17.

Beginning Sunday night, January 22, and ending the night of Monday, January 23, the Union engaged in a 24-hour "unfair labor practice strike." The stated basis for this strike was the Employer's refusal to provide information requested in connection with the Employer's disciplinary action against a unit employee. The Union did not advise the Employer in advance that the strike would last only 24 hours. Shortly before the strike was to end at midnight, the Union business agent told the plant manager that employees were making an unconditional offer to return to work; the plant manager directed him to call the Employer's lead negotiator.

When the business agent called the negotiator, the negotiator asked the business agent to repeat himself several times, then complained about the Union's recent conduct: that the Union had not gotten back to him by January 20, as promised, and that the January 17 information request was ridiculous. He told the business agent that the bargaining unit was locked out and said that, had the employees not struck that day, they probably would not have been locked out. The following day, the Employer faxed the Union a letter which stated the following: the Company had put forth a good faith best and final offer that had been voted down by the unit members; the Employer had received no additional proposals from the Union and the Union failed to get back with the Employer as promised; since the ratification vote the Company had only seen game-playing from the Union; the Company was tired of waiting for the issue to be resolved; the Company must ensure that it met its customers' needs, and to do so, the Company required a regular workforce and labor peace; the lack of a contract, and consequently, the absence of a nostrike provision put these requirements in jeopardy, and, therefore, endangered the Company's business; the Company had not locked out the employees because of the strike but the strike was the last straw in the game-playing; the Company could not do business under a constant threat of intermittent strikes; therefore, for the reasons explained above, the Company must run its business and ensure the needs of its customers.

³ As noted infra, the Region subsequently dismissed that charge.

The letter also discussed the information request that the Union made on January 17, stating that the parties had discussed the information during bargaining, the current survey had been provided, 4 and the Union was simply seeking the information in an attempt to discover evidence concerning its January 10 charge against the Company.

On February 16, the Employer sent a letter to its employees that stated the reasons for the lockout and that the Union could end the lockout by accepting the Employer's final offer. On March 21, after the Region had determined to dismiss the charge in Case 4-CA-34385, the Employer provided the Union with the information requested in its January 17 letter. On March 23, the parties recommenced their negotiations, finally reaching agreement on a collective-bargaining agreement which was executed on May 1. Following the execution of the agreement, all employees returned to work for a three-hour reorientation and safety meeting on May 4, and full-time work on May 25, thus ending the lockout. 6

ACTION

We conclude that the lockout was unlawful because it was in furtherance of an unlawful bargaining position created by the Employer's failure to provide the requested information. We also conclude that the Employer adequately informed the Union of what was necessary to end the lockout.

1. Legality of the Lockout

It is well settled that, even absent an impasse in bargaining or the threat of an imminent strike, a lockout

⁴ During the parties' early November wage negotiations the Employer provided the Union with a copy of a current wage survey prepared by Ocean Spray which included several manufacturing facilities in the local area. The Employer used the survey to show the Union that its employees were paid in the top 10% of their field.

 $^{^{5}}$ The Union contends that this was the first time that the Employer said what the Union needed to do to end the lockout.

 $^{^6}$ Since the only practical reason for Section 10(j) relief would have been to return the employees to work during bargaining, it is clear that the question of the need for Section 10(j) relief is now moot.

for the "sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position" is not unlawful and is not inherently destructive of employee rights. Rather, economic pressure in support of a lawful bargaining position is a legitimate and substantial business justification for a lockout. 8

However, a lockout that occurs while an employer is unlawfully refusing to provide information relevant to bargaining may be held unlawful if at the time of the lockout the failure to timely provide the information would preclude meaningful bargaining. Thus, in Globe Business Furniture, Inc., where the employer had repeatedly failed to provide the union with requested information which the Board found "crucial" and "central to bargaining," the employer's lock out of its employees was unlawful.9 In contrast, in Brewery Products, Inc., although the employer had unlawfully failed to provide requested information, its lockout was lawful because the delay in providing the information "did not appear to be of sufficient importance to negate a finding of impasse" and bargaining was so polarized the failure to provide relevant information did not preclude meaningful bargaining. 10

We agree with the Region that the Employer's lockout was unlawful from its inception due to the Employer's failure to timely respond to the Union's pre-lockout information request. Here, as in <u>Globe Business Furniture</u>, before locking out its employees on January 24, the Employer failed to provide the Union with requested information needed for the Union to meaningfully bargain. Thus, when the parties met on December 10, the Employer insisted on its December 7 wage offer, explaining that it

⁷ American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965). See also Darling & Co., 171 NLRB 801, 802-803 (1968) (neither absence of impasse or threat of imminent strike precludes finding that lockout in support of legitimate bargaining position is lawful), enfd. sub nom. Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

⁸ Central Illinois Public Service Co., 326 NLRB 928, 932
(1998), enfd. sub nom. Electrical Workers IBEW Local 702 v.
NLRB, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S.
1051 (2000).

 $^{^9}$ 290 NLRB 841, 841, n.2 (1988), enfd. 889 F.2d 1087 (6th Cir. 1989) (unpublished table decision).

¹⁰ 302 NLRB 98, 102, 98 n.2 (1991).

routinely compared its wage rates to those of other local companies using wage surveys. While the Employer had provided a current wage survey it relied on in making its December proposal, the Union's January 17 request concerned wage surveys the Employer had used in the past, as well as the past wage adjustments the Employer had made. The requested information would permit the Union to evaluate the relationship between the wage surveys and wage adjustments in the past as compared with the current survey and the proposed wage increases in the Employer's wage proposal.

The Employer refused to provide this information and locked out the unit employees. The Employer now asserts that it had made its best and final offer and was using the lockout as a form of economic pressure. However, by failing to provide the information, the Employer placed itself in an unlawful bargaining posture because by not providing the wage information the Employer precluded the Union from being able to engage in meaningful bargaining about the Employer's wage proposal. The Employer's asserted defense that it refused to provide the information because it believed the Union was merely seeking discovery in its pending ULP charges is without merit. 11 In sum, as in Globe Business Furniture, the lockout violated Section 8(a)(3) and (1) because the Employer had failed to timely provide information needed for meaningful bargaining.

However, we would not further argue that the lockout was unlawful because the Employer did not adequately inform the Union of what was necessary in order for the Union to end the lockout. A fundamental principle underlying a lawful lockout is that the union must be informed of the employer's bargaining demands that precipitated the lockout so that the employees can evaluate whether to accept the terms and return to work. In Dayton Newspapers, the Board

¹¹ See <u>Langston Companies</u>, <u>Inc.</u>, 304 NLRB 1022, 1068, (1991) (fact that unfair labor practice charge was filed before information was requested that was relevant both for bargaining and for the processing of the unfair labor practice charge does not provide defense for respondent not providing requested information).

¹² See Dayton Newspapers, Inc., 339 NLRB 650, 657-658 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005); Eads Transfer, Inc., 304 NLRB 711, 712 (1991) (locked-out employees must be able to "knowingly reevaluate their position and decide whether to accept the employer's terms"), enfd. 989 F.2d 373 (9th Cir. 1993).

found that the employer failed to provide the union with a clear set of conditions for reinstatement, and that it continued to revise its demands with respect to requiring assurances against further work stoppages and the acceptance of operational changes.¹³ The Board characterized the employer's conditions for reinstatement as a "moving target" which prevented the union from intelligently evaluating its position, rendering it powerless to end the lockout, and therefore held that the lockout violated Section 8(a)(3) and (1).¹⁴

Here, however, unlike in Dayton Newspaper, the Employer did adequately inform the Union of what was necessary to end the lockout. First, the Employer had made clear that it was looking for a resolution of the contract issues in dispute. During the December 10 session, the Employer suggested that the parties were at impasse and even threatened to implement parts of its final offer, but was willing to wait to hear back from the Union. In its January 24 letter to the Union the Employer reiterated that the offer had remained on the table but the Union had failed to respond as promised. The Employer indicated that it felt that the Union was "game-playing" and stated that it was tired of waiting to resolve the issue. Second, in that letter the Employer made clear that it was concerned about stability of production in the absence of a contract. It told the Union that it had to meet its customers' needs, and, to do so, the Company required a regular workforce and labor peace. The Employer further stated that the lack of a contract, and consequently, the absence of a no-strike provision, put the requirements in jeopardy, that the Company could not do business under such constant threat of intermittent strikes, and that these were the reasons for the lockout. Thus, the Union was adequately informed that the acceptance of the Employer's final and best offer would have ended the lockout.15

2. [FOIA Exemptions 2 and 5]

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 $^{^{13}}$ 339 NLRB at 658.

¹⁴ Id.

¹⁵ It should be noted that even if the January 24 letter arguably did not provide the Union with adequate information, the Employer's February 16 letter to the employees specifically stated that the Union could end the lockout by accepting the Employer's final and best offer.

[FOIA Exemptions 2 and 5, cont'd

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Accordingly, absent settlement, the Region should issue complaint alleging that the Employer unlawfully locked out its employees because the lockout was in furtherance of an unlawful bargaining position, created by the Employer's failure to provide the requested information necessary for bargaining.

B.J.K.

16 [FOIA Exemptions 2 and 5

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17 [FOIA Exemptions 2 and 5